FILE COPY

No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1931

EX PARTE: THE STATE OF COLORADO, PETITIONER

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR THE RESPONDENT IN SUPPORT OF RESPONSE TO THE RULE

INDEX

	Page
Jurisdiction	1
Statute involved	2
Statement	3
Summary of argument	3
Argument	5
Conclusion	14

CITATIONS

Cases:	
Griffiths v. *Hardenbergh*, 41 N. Y. 464	10
McCain v. *Des Moines*, 174 U. S. 168	11
Maryland v. *Soper (No. 1)*, 270 U. S. 9	2, 5–7, 8, 12
People of State of New York v. *Walsh*, 40 F. (2d) 58	13
Rhode Island, Ex parte, 289 U. S. 530	13
State of Iowa v. *City of Des Moines*, 96 Iowa 521	11
State of Maryland v. *Ford*, 12 F. (2d) 289	12–13
State of Rhode Island v. *Richardson*, 32 F. (2d) 301	13
Tennessee v. *Davis*, 100 U. S. 257	10–11
Virginia v. *De Hart*, 119 Fed. 626	10
Wilson v. *Fowler*, 88 Md. 601	10
Statutes: Judicial Code, Sec. 33, as amended by the Act of August 23, 1916, c. 399, 39 Stat. 532 (U. S. C., Title 28, Sec. 76)	2–3
Miscellaneous: Bouvier, Law Dictionary, *Color of Office*	10

In the Supreme Court of the United States

OCTOBER TERM, 1931

NO. —, ORIGINAL

EX PARTE: THE STATE OF COLORADO, PETITIONER

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR THE RESPONDENT IN SUPPORT OF RESPONSE TO THE RULE

JURISDICTION

This is a motion by the State of Colorado for leave to file an original petition for a writ of mandamus directed to the District Court of the United States for the District of Colorado and to the Judge of that Court. The jurisdiction of this Court is invoked under Section 234 of the Judicial Code (U. S. C., Title 28, Sec. 342) which provides:

> The Supreme Court shall have power to issue * * * writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the

> authority of the United States, or to persons holding office under the authority of the United States, where a State * * * is a party.

That the instant case falls within the class of cases in which this Court may issue a writ of mandamus is clear. *Maryland* v. *Soper* (No. 1), 270 U. S. 9. On February 23, 1932, this Court ordered that a rule issue requiring the respondent to show cause why leave to file the petition for mandamus should not be granted. The rule was made returnable on or before March 14, 1932.

STATUTE INVOLVED

Section 33 of the Judicial Code, as amended by the Act of August 23, 1916, c. 399, 39 Stat. 532 (U. S. C., Title 28, Sec. 76), provides, so far as material here:

> That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the dis-

> trict where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. * * *

STATEMENT

The facts appear in the response to the rule to show cause which is filed simultaneously with this brief.

SUMMARY OF ARGUMENT

The petition for removal contains a full and frank explanation of the petitioner's relation to the transaction involved in the proceedings in the State court, and indicates no purpose on his part to conceal any fact or circumstance which might tend to show that the act charged against him as a crime was performed otherwise than in the course of his official duties as a Federal prohibition agent. The allegations of the petition clearly negative the possibility that at the time he dealt the blow which

resulted in the death of the deceased the petitioner was performing other than official acts upon which the prosecution could be based. The petition therefore fully complies with the requirements for removal petitions under Section 33 of the Judicial Code as laid down by this Court in *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9.

It was not essential under the removal statute that the petition show that the act charged against the petitioner as an offense was *justified* by his official duty. It was enough that the act was done "under color of" the petitioner's office. An act is done "under color of office" when it is ostensibly done in the performance of the officer's duties and within the apparent scope of his authority. The phrase "color of office" embraces a claim which may later turn out to be groundless, as well as a claim which on full investigation is shown to be well founded.

The objections that the petition showed that the petitioner used more force than was reasonably necessary to effect an arrest for a misdemeanor; that it failed to show that the deceased had knowledge of the petitioner's official capacity, or whether the deceased was a boy or a man, or of large or small physique, etc., all relate to the question whether the petitioner was justified by his Federal office in doing the act charged against him as a crime, rather than to the only issue which is involved in the present proceedings, namely,

whether the act was done "under color of" his office.

ARGUMENT

THE CASE WAS PROPERLY REMOVED TO THE FEDERAL COURT

In its petition for mandamus and supporting brief, the State of Colorado challenges the sufficiency of the petition for removal on the ground that it fails to comply with the requirements for removals under Section 33 of the Judicial Code laid down by this court in *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9. In that case a prosecution of Federal prohibition agents on a charge of murder was removed from the Circuit Court for Harford County, Maryland, to the Federal District Court, and a motion by the State that the Federal court rescind its order of removal was denied. The State thereupon applied to this Court for leave to file a petition for a writ of mandamus to compel the District Court to remand the case. Leave was granted and, following a hearing, this Court rendered an opinion in which it held that prohibition agents came within the scope of Section 33 (pp. 30–32) and stated the essentials to establish a case for removal under that section as follows (pp. 33–34):

> The prosecution to be removed under the section must have been instituted "on account of" acts done by the defendant as a federal officer under color of his office or of the revenue or prohibition law. There must be a causal connection between what the officer has done under asserted official author-

ity and the state prosecution. It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty. But the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution.

* * * * *

In invoking the protection of a trial of a state offense in a federal court under section 33, a federal officer abandons his right to refuse to testify because accused of crime, at least to the extent of disclosing in his application for removal all the circumstances known to him out of which the prosecution arose. The defense he is to make is that of his immunity from punishment by the State, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based. He must establish fully and fairly this defense by the allegations of his petition for removal before the federal court can properly grant it. It is incumbent on him, conformably to the rules of good pleading, to make the case on which he relies, so

> that the court may be fully advised and the State may take issue by a motion to remand.

Referring then to the allegation of the petition that the indictment was a criminal prosecution "on account of acts alleged to have been done by * * * petitioners at a time when they were engaged in the performance of their duties as Federal Prohibition Officers," this Court held such allegation to be insufficient, saying (p. 35):

> These averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties. They do not negative the possibility that they were doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty. * * * In order to justify so exceptional a procedure, the person seeking the benefit of it should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer.

The petition was held to be further defective because of its failure to mention certain circumstances which were within the knowledge of petitioners and which had a tendency to show the reason and occasion for the criminal charge against them. Holding, therefore, that a case for removal was not made

out by the petition, this Court ordered that mandamus issue unless the District Court should permit an amendment of the petition which would supply the deficiencies pointed out in the opinion.

In the instant case the removal petition is not open to the objections found by this Court in the petition in *Maryland* v. *Soper, supra.* The present petition avers that all the acts and doings of the petitioner leading up to and including the act for which the information was filed against him in the State court were done under and by right of his office as a Federal prohibition agent. It furthermore alleges that the charge against the petitioner is based entirely upon the circumstances related in the petition, thus negativing the possibility that he was acting otherwise than officially when he delivered the blow which resulted in the death of the deceased. The petition indicates no purpose on the part of the petitioner to conceal any fact which might tend to show that such blow was dealt otherwise than in the performance of his duties. On the contrary, it contains a candid, specific, and positive explanation of the petitioner's relation to the transaction growing out of which he was informed against. Thus, after showing that petitioner's presence on the premises was in pursuance of an order of his superior officer to investigate reported violations of the National Prohibition Act there, the petition states that upon seeing Smith in the possession of the bottle of wine the petitioner proceeded to take possession of the wine and to

arrest Smith; that Smith "did resist arrest, did attempt to destroy said bottle of wine, and did proceed to assault your petitioner and did attempt to escape"; that thereupon one Al Green attempted to assist Smith to assault the petitioner and to attempt to escape; that "in the scuffle that ensued, and while your petitioner was engaged in * * * making, and attempting to make, said arrest of said Melford Smith, and in protecting himself in the discharge of his duties, and in attempting to seize said bottle of wine, it became necessary in order to subdue the said Melford Smith for your petitioner to strike, and he did strike, the said Melford Smith on the head with your petitioner's gun," and that, upon petitioner's information and belief, Smith died as a result of the blow given by the petitioner.

It is submitted that these uncontroverted allegations show that the criminal prosecution commenced in the State court against the petitioner was "on account of" an act done by him "under color of his office," and that the petition therefore adequately states a case for removal under Section 33.

The brief filed on behalf of the State is largely devoted to arguments which rest upon the assumption that the petitioner was acting beyond the scope of his authority when he delivered the blow which resulted in the death of Smith. It is pointed out that the possession of the bottle of wine by Smith was but a misdemeanor, and many authorities are

cited to show that an officer is not justified in taking human life in order to effect an arrest for such an offense. But the premise upon which these contentions are based finds no support in the statute. Section 33 does not confine the right to remove to cases where the suit or prosecution in the State court is for an act which the officer was authorized or required to do by his Federal duty. That would require a complete justification by the officer, whereas under the statute it suffices that the act be done "*under color* of his office," that is, in the ostensible pursuit of his duties and within the apparent scope of his authority. As held by the District Court in this case, the phrase "color of office" covers a claim which may later turn out to be groundless, as well as a claim which full investigation shows to have been well founded. See Bouvier, Law Dictionary, "Color of Office." *Virginia* v. *De Hart,* 119 Fed. 626 (C. C. W. D. Va.); *Griffiths* v. *Hardenbergh,* 41 N. Y. 464 469–470; *Wilson* v. *Fowler,* 88 Md. 601, 605. In *Tennessee* v. *Davis,* 100 U. S. 257, this Court, with reference to the identical provisions of Section 643 of the Revised Statutes (which statute was reenacted as Section 33 of the Judicial Code), said (pp. 261–262):

> But the act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, *or claimed to have been done,* in the discharge of his duty as a Federal officer. It makes such a claim a basis for the assumption of Federal

> jurisdiction of the case, and for retaining it, at least until the claim proves unfounded. (Italics ours.)

Regarding the similar phrase "color of law," the following was quoted in *McCain* v. *Des Moines,* 174 U. S. 168, 175, from the opinion of the Supreme Court of Iowa in *State of Iowa* v. *City of Des Moines,* 96 Iowa 521, 535:

> "Color of law" does not mean actual law. "Color," as a modifier, in legal parlance, means "appearance as distinguished from reality." Color of law means "mere semblance of legal right." Kin. Law Dict. & Gloss.

Where, therefore, an officer who is authorized to arrest for an offense committed in his presence, or to seize contraband property openly possessed in his view, is obstructed in arresting the offender or seizing the contraband, his act in overcoming such resistance to the exercise of his lawful authority is done "under color of his office," within the meaning of Section 33, regardless of whether he used more force than was reasonably necessary to carry out his duty. If the force used by the officer in such case is excessive, and therefore beyond the scope of his authority, he may be subjected therefor to a civil suit or criminal prosecution. But if he comes within the class of officers to which Section 33 applies, he is given the right by that statute to have any civil suit or criminal prosecution commenced against him in a State court on account of

the act thus performed "under color of his office" removed to the Federal court, where it will be tried out on its merits.

Such is the effect given the decision in *Maryland* v. *Soper, supra,* in the subsequent proceedings in that case. Following that decision, Judge Soper, pursuant to the authority therein given him, permitted an amendment of the petition for removal, and upon the filing of the amended petition again ordered the case removed to his court. The State of Maryland moved to rescind the removal order on the ground that the allegations of the amended petition did not disclose facts entitling the petitioners to the relief prayed. In an opinion denying that motion Judge Soper said (*State of Maryland* v. *Ford,* 12 F. (2d) 289, 291–292):

> The state of Maryland criticizes the new petition substantially on two grounds: (1) That the facts set out do not justify a homicide; and (2) that it is very improbable that the deceased was shot during the pursuit of the men who fled, because they ran in a northerly direction, whereas he was found about 300 yards to the south of the site of the still. In regard to the first point, it may be said that it is not necessary, in order to justify a removal, that the agents show in their petition that the homicide, if committed by them, was justified under the law. The order of removal does not determine either the guilt or innocence of the accused, but merely that the prosecution is based upon their official acts.

> As to the second point, it is true that the petition does not explain how the wounded man reached the spot at which he was found. But the incident is not in itself impossible, and an explanation is not essential to the petitioners' case. Nor is it necessary for the petitioners to demonstrate or admit that one of them shot the deceased. "It is enough that their acts or their presence at the place in performance of their official duty constitute the basis, though mistaken or false, of the state prosecution."

See also, *State of Rhode Island* v. *Richardson,* 32 F. (2d) 301, 302–303 (D. R. I.), motion for leave to file a petition for a writ of mandamus denied, *Ex parte Rhode Island,* 280 U. S. 530; *People of State of New York* v. *Walsh,* 40 F. (2d) 58, 61–62 (E. D. N. Y.).

The further objections raised on behalf of the State of Colorado to the removal petition in this case, that it failed to allege that the deceased, Melford Smith, had knowledge of the petitioner's official capacity; that it failed to show whether Smith was a boy or a man, or of large or small physique, or was about to overpower the petitioner, and that it failed to state facts or circumstances which would render the petitioner immune from punishment under the laws of the State, all relate to the question whether the petitioner was justified by his Federal office in doing the act which is charged against him as a crime, rather than to the only issue which is involved in the present proceedings,

namely, whether the act was done "under color of" his office.

CONCLUSION

The case was properly removed to the Federal court. The rule should therefore be discharged and the motion for leave to file a petition for mandamus should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
MAHLON D. KIEFER,
JOHN J. BYRNE,
ERWIN N. GRISWOLD,
Attorneys.
Of Counsel for the Respondents.

MARCH, 1932.

APPENDIX

UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO

No. 7000

HENRY DIERKS, PETITIONER

MEMORANDUM

November 13, 1931, Henry Dierks filed his petition in this court, asking for a writ of certiorari and habeas corpus cum causa; Sec. 33, J. C., Sec. 76, Tit. 28, U. S. C. A. Briefly, the petition alleges that on the ninth day of November, 1931, a criminal proceeding was commenced against him in the state district court for the First Judicial District of Colorado, County of Arapahoe, by the filing of an information charging that the petitioner on the seventh of November, 1931, feloniously, unlawfully, etc., killed and murdered one Melford Smith; that he had been arrested pursuant thereto, admitted to bail, and that said criminal proceeding was still pending, and there had been no trial or final hearing.

He further shows that prior to November 7, 1931, and on that date, he was a Federal officer, acting under authority of the revenue laws of the United States, to wit, a prohibition agent, and the act for which he was informed against and held in

the state court was performed while engaged in the discharge of his duties as such prohibition agent.

The facts set forth are that on November 7, 1931, he, together with prohibition agent Ellsworth, was directed by his superior to investigate a complaint of violations of the national prohibition law reported as being committed at No. 3005 South Broadway, Englewood, Arapahoe County, Colorado; that pursuant thereto petitioner and Ellsworth proceeded to the said location—a public restaurant, or so-called "hamburger" stand—that he entered, informed the proprietor, or man in charge, that he was a Federal prohibition agent, at the same time exhibiting his badge, stating that he had come to investigate alleged violations of the Prohibition Act on the premises and desired to look around; that the said proprietor, or person in charge, gave permission so to do; that thereupon one Melford Smith, a young man, entered the premises, walked to the rear, and seating himself on an unoccupied stool at the customers' counter, took out a pint bottle of wine from his coat pocket, set it on the counter in full and open view of petitioner, and proceeded to look around for a drinking glass; that petitioner observing this action and the wine, and believing that said Smith was engaged in violation of the Prohibition Act and internal revenue laws of the United States, attempted to take possession of the wine and arrest said Smith; that said Smith resisted arrest, attempted to destroy the bottle, and did proceed to assault your petitioner and attempt to escape. Further, that a bystander, one Green, attempted to assist Smith to assault petitioner and

to help him to escape, and that in the scuffle that ensued, and while petitioner was engaged in the discharge of his official duties in making, and attempting to make, said arrest of Smith, and protecting himself in the discharge of his duties, and in seizing said wine, it became necessary, in order to subdue said Smith, for petitioner to strike, and he did strike said Smith on the head with his gun; that thereupon the said prohibition agent Ellsworth came to the assistance of petitioner and they arrested Smith and others who had taken a part in the affray, placed them in jail pending the filing of charges for violation of the Prohibition Act and for assaulting an officer of the United States; that at the time said Smith was placed in the jail of the City and County of Denver he did not appear to have received any serious injury, but on the following day, after spending a night in jail, he became sick and died. Petitioner is informed—and on information and belief alleges—that said Smith died from an injury to his head, caused by a blow given to said Smith by petitioner during the scuffle aforesaid; that said charge of murder referred to is based entirely upon the circumstances surrounding said injury and subsequent death of Smith as related.

Petitioner further alleges that he is not guilty of the crime of murder, or any other offense under the laws of the State of Colorado; that said criminal proceeding referred to arises solely out of the acts performed by said petitioner as an officer acting under the revenue laws of the United States, and while acting as United States prohibition agent.

On presentation of the petition this court issued a writ of habeas corpus cum causa, which was served upon the clerk of the state court, and agreeable thereto, the record and proceedings of said cause in the state court were transmitted here. The matter is now before the court on motion of the state District Attorney for the County of Arapahoe to quash the writ and remand the cause.

This motion sets up numerous grounds, but without enumerating them in detail, it may be said that the main contention is that the petition does not bring the case within Sec. 33 of the Judicial Code of the United States (Tit. 28, Sec. 76, U. S. C. A.).

Let us look at the statute:

> When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under, or acting by authority of any revenue law of the United States, or against any person acting under and by authority of any such officer on account of any act done under color of his office, or of any such law * * * the said suit or prosecution may at any time before trial, or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court, and in the following manner.

Then follow the procedural steps necessary to transfer the case to the Federal court, upon compliance with which the statute states:

> It shall be the duty of the state court to stay all further proceedings in the cause, and the suit, * * * shall be held to be removed to the district court.

It is admitted that the proper procedural steps have been taken both in this court and the state court to remove the cause here. Is the case made covered by this section?

Preliminarily, let us say that a good deal of the argument and many of the cases cited in support of the motion to remand are not in point, being based upon Secs. 451, 452, 453, and 461, Tit. 28, U. S. C. A., which vest the Federal courts and the judges thereof with plenary power to issue writs of habeas corpus and to inquire into the cause of restraint of liberty of any citizen and to dispose of the party as law and justice require, if he is in custody in violation of the Federal Constitution.

Sec. 453, supra, provides that the writ of habeas corpus shall extend to a person who is in custody for an act done or omitted pursuant to a law of the United States, etc. And Sec. 461 imposes upon the Federal judge the duty to proceed in a summary way to determine the facts by hearing testimony and arguments, and dispose of the party as law and justice require.

The provisions and the remedies afforded by these sections are entirely different from the ones involved here. They give the Federal court in a proper case the power to *discharge* the prisoner from custody by the state even before trial, or after trial and conviction, and while serving sentence. This is a far more drastic power than that granted by Sec. 33, supra, because they authorize Federal courts to pass upon the guilt or innocence of the petitioner in a proper case, and to free him from prosecution or conviction in the state court.

Such was the question involved in *Drury* v. *Lewis,* 200 U. S. 1, where it is said (p. 7) quoting from *Baker* v. *Grice,* 169 U. S. 284, that:

> a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented.

See also *In re Neagle,* 135 U. S. 1.

In *Ex parte Crouch,* 112 U. S. 178, the petitioner was an ordinary citizen charged with a violation of the state law. The Court said in discharging the writ that the only question was the sufficiency of his defense to the information under which he was held. There was no claim that he was a Federal officer, or acting under the authority of the United States, etc. The Chief Justice specifically stated that its holding had no application to writs of habeas corpus cum causa issued by the courts of the United States in aid of their jurisdiction upon the removal of suits or prosecutions from the state court for trial under the authority of an act of Congress.

Ex parte Royall, 112 U. S. 181, involved nothing more than a question of appellate practice on a writ of habeas corpus. Likewise in *Castle* v. *Lewis,* 254 Fed. 917, Judge Sanborn was considering said Sections 451, 452, 453, and 461, Tit. 28. He held that the Federal courts had plenary jurisdiction thereunder, to inquire into the cause of confinement—where the petitioner alleges he is held in

violation of the Constitution, or a law or treaty of the United States—by means of habeas corpus, and to discharge the prisoner in a proper case.

Sec. 33 of the Jud. Code has nothing in common with the above. The writ provided for is not a true habeas corpus writ. Habeas corpus is directed to a person detaining another, commanding him to produce the body of the prisoner, and to submit to whatever the court or judge issuing the writ shall consider in that behalf. It is a high prerogative writ of the common law, the object of which is the liberation of those who may be imprisoned without sufficient cause.

The procedure we are here considering is really the old writ of habeas corpus ad faciendum et recipiendum, which according to Blackstone, was issued in civil cases to remove the cause, as well as the body of the defendant, from an inferior to a superior court having jurisdiction. Its object is to remove the cause, as explained by Chief Justice Marshall in *Ex parte Bollman,* 4 Cranch 74, and all this section authorizes is the removal of the cause to the Federal court for trial, as a cause originally commenced in the Federal court. The judge issuing the writ does not pass upon, nor is the petitioner's guilt or innocence involved. If sustained the Federal court tries the case—in this instance to a jury—on the same information and in the same manner as it would be tried in the state court. In short, this is nothing more than a proceeding to remove a criminal case from the state to the Federal court, in the same manner that many other causes are removable from the state to the Federal court, and upon a proper showing being made this court has no discretion. The petitioner

can not be denied a right given him by the Congress.

The case made by petitioner clearly entitles him to removal. Acting under the authority of a Federal law, he was on the premises in question under orders of his superior officers, saw a Federal law being violated, and says the death of Smith resulted from a blow received while resisting arrest and assaulting petitioner. This is not denied. *Maryland* v. *Soper,* 270 U. S. p. 9, after holding that this section applies to prohibition agents, says:

> It is enough . . . his acts or his presence at the place in performance of his official duty constitutes the basis, though mistaken or false, of the state prosecution.

And that—

> The defense he is to make is that of his immunity from the punishment by the State, because what he did was justified by his duty under the Federal law and because he did nothing else on which the prosecution could be based.

Petitioner negatives the possibility that he was acting otherwise than officially at the time. Whatever he did leading to the prosecution was under color of his official Federal duty. Unlike the *Soper case* petitioner admits he brought about the death of Smith.

The Attorney General of Maryland rightly argued in the Soper case that under Sec. 753, supra, a petitioner must establish, inter alia, his innocence of the crime charged as a condition of his release; that under Sec. 33, supra, it is only necessary to show that the act upon which the prosecution was

grounded was done in the probable pursuance of his duties, and within the apparent scope of his authority; that all that is necessary is a prima facie showing that the act was done under the color of office. The phrase "color of office" may cover a claim that later turns out to be groundless, as well as a claim, which upon full investigation is shown to be well founded, and the statute requires only a fair showing that the officer was acting at the time in the probable course of his duty. *Tennessee* v. *Davis,* 100 U. S. 257; *Maryland* v. *Soper, supra.*

In that case the Supreme Court, in answer to the direct question certified by the circuit court, as to whether an indictment of a revenue officer of the United States for murder found in the state court under a state of facts alleged in the petition for removal (identical with those in the case at bar), is removable under this section, said (271):

> It ought therefore to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offenses against the state laws, from the state courts to the circuit court of the United States, when there arises a Federal question in them, is as ample as its power to authorize the removal of a civil case.

The argument is pressed on us that the removal of the case would violate the sovereignty of the State of Colorado and prevent the state from trying persons charged with the violations of its laws. Such reasoning is plausible but fallacious. We live under a dual sovereignty, that of the National Government and the respective states. In adopting the Constitution the states surrendered some of their sovereignty to the Federal Government.

Neither the Federal nor the state government is absolutely supreme. There is a division of judicial powers both civil and criminal between the state and national courts, and when a particular state of facts places a case under the powers of the Federal Government, it of course must assume jurisdiction, and the state can not complain. Likewise, the Federal courts almost daily take notice of the limitations on their powers, by refusing jurisdiction and remanding to the state courts matters beyond their powers, and solely within the jurisdiction of the states.

There can be no conflict of jurisdiction. The judges and officers of the state and Federal courts are in duty bound by their oath to observe and respect each other's jurisdiction, and the United States Constitution, and the laws made thereunder are supreme and binding on both. *Tennessee* v. *Davis, supra,* p. 266. In the final analysis both administer the same laws, whether they be enactments of the National Congress or of the state legislature, and are equally bound to observe the following rule of the Supreme Court. (*Ex parte Young,* 209 U. S. 123.)

> We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may arise which we would gladly avoid, but we can not avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty.

Other pertinent cases are *Davis* v. *South Carolina,* 107 U. S. 597; *State of Rhode Island* v. *Richardson,* 32 Fed. (2d) 301; *People of the State of New York*

v. *Walsh,* 40 Fed. (2d) 58; *Cleveland, Columbus, etc., Railroad* v. *McClung,* 119 U. S. 454.

State's counsel admit the feeling against petitioner in his district is such that he can not have a fair trial. That this is in part, at least, the result of the agitation and unfair publicity by the local papers, will not be denied.

It is the paramount duty of a court, above all other considerations, to assure a defendant a fair trial by a jury drawn from a district where such feeling does not exist.

If the Mooney case, so called, is, as stated by one of our papers, a travesty on justice, and the Sacco-Vanzetti trial a judicial murder, it was due directly to unwarranted agitation and inflamed and unreasoning public opinion.

Colorado does not need a cause celebre.

The motion to remand will be denied.

JANUARY 2, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932